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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1961

No. 852

B. T. WOODARD and B. J. WOODARD
d/b/a WOODARD MOTOR COMPANY,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Respondent's Brief In Opposition

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Petitioners' effort to secure further review is bottomed upon the false premise that the courts below have "nullified Public Law 1026 — 84th Congress" (hereinafter the "Act").[1] When this case is properly viewed on the undisputed facts and in the light of the Act as a simple contract controversy, petitioners' claim that federal legislation has been nullified and important questions of federal law thereby raised is exposed as mere pretense.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 298 F. 2d 121, and is printed in full in the appendix to the petition

[1] 70 Stat. 1125 (1956); 15 U.S.C. §§ 1221-1225 (1958).

(pp. 1a-19a), to which appendix reference is frequently made in this reply.

JURISDICTION

The jurisdictional requisites for filing the petition for certiorari are adequately set forth in the petition. Respondent denies that the petition presents any of the grounds required by Rule 19-1(b) of this Court for the granting of a writ of certiorari.

QUESTIONS PRESENTED

Petitioners preface the two "Questions Presented" on pages 3 and 4 of the petition with a two-page paragraph which is misleading in the extreme due to a combination of affirmative misstatements, omissions of fact and misinterpretation of the holding below. The two questions allegedly presented are not in fact presented because they are based upon factual assumptions contradicted by the record and upon a misinterpretation of the holding below. Accordingly a restatement of the questions actually presented by the record becomes imperative. The questions presented, each of which should be answered in the negative, are as follows:

1.

Whether the Court of Appeals erred in construing the Act, and thereby erroneously decided an important question of federal law requiring review under Supreme Court Rule 19-1(b), by holding (a) that the Act imposed a duty upon respondent, in addition to its contractual obligations, to act in good faith and

(b) that respondent acted in good faith in terminating petitioners' contract, where the undisputed facts showed that (1) petitioners, in direct breach of their contractual obligations, moved their Chevrolet dealership from the approved and satisfactory location to an unapproved location, which was never satisfactory to respondent, and (2) then procured the renewal of their Chevrolet contract by assurances and representations that the unauthorized location was "only a temporary thing" and for a "short period of time" and upon the express understanding that such "premises were not to be the permanent dealership location," and (3) in violation of their continuing obligations under the contract took no concrete steps toward providing adequate facilities for more than sixteen months, in spite of respondent's repeated efforts to induce and persuade petitioners to perform their contractual obligations?

2.

Whether the Court of Appeals decided an important state question in a way in conflict with applicable state law, so as to be considered under Supreme Court Rule 19-1(b), when it affirmed the District Court's holding that petitioners had no claim for common law breach of contract where the undisputed facts showed that petitioners had violated their continuing obligations to furnish and maintain a place of business, commensurate with the good will attached to the name "Chevrolet," and satisfactory as to appearance, location, size and layout for the service and sale of Chevrolet products?

3.

Whether the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision under Rule 19-1(b) by affirming the summary judgment granted by the District Court upon the pleadings, depositional admissions of petitioners, record stipulations and unchallenged exhibits, without any claim on petitioners' part that their testimony was not correct or that their testimony at trial would be any different or that evidence which would raise an issue of fact existed but was not then available?

* * * *

STATEMENT OF THE CASE

Nature of the Case

Petitioners brought this suit in November 1957 in the United States District Court for the Northern District of Texas, seeking $250,000 actual damages for alleged breach of a written contract and $150,000 exemplary damages (R. 24-25). Jurisdiction was based solely on diversity. Respondent moved to strike or dismiss the exemplary damage claim as not recoverable under applicable state law. Fifteen months later, in February 1959, petitioners filed an amended complaint setting forth two counts. The first again sought actual damages of $250,000 for alleged breach of contract. The second count, purportedly based on the Act,

sought recovery only of exemplary damages in the increased amount of $500,000 (R. 35-45).

After extensive depositions of petitioners had been taken, both petitioners and respondent moved for summary judgment pursuant to Rule 56, F.R.C.P., on February 5, 1960.

At pre-trial before Chief Judge Joe E. Estes on September 13, 1960, important stipulations of fact were made pursuant to Rule 16, F.R.C.P., and noted on the record (R. 147-50). At pre-trial, petitioners amended the amended complaint to demand $500,000 damages for alleged loss of anticipated profits from and after the normal expiration date of the contract (R. 129), which claim was stated to be only alternative to the exemplary damage claim (R. 146).

On September 20, 1960, petitioners' motion for summary judgment was denied and respondent's motion for summary judgment was granted (R. 143).

Petitioners' appeal to the Court of Appeals for the Fifth Circuit was heard on May 30, 1961. On January 11, 1962, the Court of Appeals unanimously affirmed the judgment of the District Court in all respects.

The following counter-statement of the facts is deemed necessary to correct the inaccuracies, unfounded assertions unsupported by the record, and important omissions in petitioners' "Statement of the Case." Petitioners' Statement further ignores decisive admissions and stipulations of fact made by petitioners

The Undisputed Facts[2]

For some years prior to 1955, petitioners, B. T. Woodard and his son, B. J. Woodard (hereinafter "father" and "son"), as partners d/b/a Woodard Motor Company, conducted a combined or dualed[3] Chevrolet and Buick dealership at 3207 Lee Street, Greenville, Texas, under written contracts with respondent (R. 155-7; 265). In 1955, respondent, being of the opinion that Greenville was a large enough town to have a separate Buick dealership, decided that the Buick contract would not be renewed on a dualed basis at its expiration in October 1955 (R. 268-9). In response to urgings by the father and son, respondent agreed to enter into a Buick contract with the son individually upon the express understanding that he would establish and thereafter maintain "an exclusive dealership with separate investment and separate facilities," to be operated by the son alone under the name "Woodard Buick Company" (R. 272; 171-2).[4] A new Buick contract, effective November 1, 1955, was entered into with the son, who established the new Buick dealership at 1403 Stonewall Street after such facilities had been approved for the new separate dealership (Am. Comp., para. 16, R. 41). A new Chevrolet contract, also effective November 1, 1955, was entered into with Woodard Motor Company,

[2] All record references in this factual statement are to the depositions of petitioners and exhibits thereto, unless otherwise noted.

[3] The term used in automobile parlance for such combined operations is "dualed dealership."

[4] In violation of this understanding, the father and son continued to treat the Buick operation as a partnership, splitting the profits on a 50-50 basis (R. 188-9; D. Ex. 6, R. 369; D. Ex. 7, R. 380), a fact disclosed during petitioners' depositions.

which continued to occupy its long-approved facilities at 3207 Lee Street, until late March or early April 1956 (R. 427-9; 433). One of the stipulations at pretrial was that:

> "It is uncontroverted that as of March, 1956, the Lee Street facilities of the plaintiff for selling and servicing defendant's Chevrolet automobiles were an established, satisfactory facility within the meaning of Section 11 of the Franchise Agreement." (R. 147)

The Lee Street premises were owned by J. B. Curtis, Jr., and had been occupied by Woodard Motor Company since 1936 under a series of five-year leases (R. 155-7; 274). The then current five-year lease, which provided a rent of $600 a month, was to expire on April 6, 1956 (D. Ex. 9; R. 390).

During the first week of March 1956, Curtis offered to renew the lease for another five-year term at the same rent and on March 20 offered to reduce the rent to $500 a month for another five-year term. The offer was not accepted by petitioners, who told Curtis they had in mind "possibly a six months or year lease", which Curtis was unwilling to enter into except at a rental of $1,000 a month (R. 276; 274-8).

In early March 1956, the father called the Chevrolet zone manager Alley and told him that the landlord was raising the rent from $600 to $1,000 (R. 177). The son, who had all the discussions with the landlord, also told Alley at a later date that "as conditions were I couldn't rent the building for less than $1,000.00" (R. 309). When asked if he had told Alley

that the landlord had offered to rent it at the same or a lower rent, he said "I don't know" and "I don't remember" (R. 309). On another occasion the landlord offered to renew the lease for $400 per month (R. 275-8).

Shortly following the father's telephone call, Alley went to Greenville where the father drove him around town looking at various buildings. The only building discussed as a possible location for the Chevrolet dealership was the Chrysler-Plymouth building, which Woodard told Alley he could get (R. 177). Alley told him that this building would be "satisfactory" (R. 178). The father also mentioned the possibility that he might build a new building and Alley advised him, in that event, to stay where he was (R. 178-9).[5] He did not tell Alley of any contemplated move of the Chevrolet dealership to the Stonewall Street facilities where the son's Buick dealership was housed (R. 178-9).

The Unauthorized Move

Respondent first learned of petitioners' intention to move the Chevrolet dealership to the Stonewall Street location when Chevrolet's local representative Horn called on the petitioners shortly before the move was scheduled to begin (R. 279-80). Horn asked the Woodards if they were planning to move the dealership and, upon learning that they were, he asked whether or not they had discussed the matter with Alley. The father

[5]The father's reference to the idea of building himself a new building was nothing new. He had mentioned the same idea to Buick "quite a little while" before 1955 (R. 169).

replied, "No." Horn then put in a call for Alley at his office in Dallas and discovered that he was in Detroit. According to the son, Horn then wrote a letter to Alley so that Alley would receive it on his return. Several days later, when nothing had been heard from Alley, the father told Horn, "Well, we are going to have to start moving" (R. 280-1). Thereafter, the move was completed and the Chevrolet dealership was moved in with Buick at Stonewall Street.

Section 11 of the contract in suit provides (R. 61-2):

> "11. Dealer's Place of Business
>
> "In order to provide product representation commensurate with the good will attached to the name 'Chevrolet' and to facilitate the proper sale and servicing of Chevrolet motor vehicles, chassis, parts and accessories, Dealer will maintain a place of business satisfactory as to appearance and location, and adequate in size and layout for new car sales operations, service operations, parts and accessories sales and used car sales, and will maintain the business hours customary in the trade.
>
> "Once Dealer is established in facilities and at a location mutually satisfactory to Dealer and Chevrolet, Dealer will not move to or establish a new or different location, branch sales office, branch service station, or place of business, including any used car lot or location without the prior written approval of Chevrolet."

Section 23 B(2) provides (R-71-2):

> "(2) If Dealer does not conduct its business in accordance with any requirement set forth in

> Sections 11 through 17, inclusive, or Section 19 of this Agreement, Chevrolet may terminate this Agreement by giving to Dealer written notice of termination to be effective three (3) months after receipt of such notice."

Petitioners admitted that they knew that under the terms of their contract with respondent any transfer of the Chevrolet dealership from the approved Lee Street location required the prior written approval of Chevrolet (R. 281-2). While the son testified that Horn, the local representative of Chevrolet, in response to the father's statement that petitioners had decided to "start moving," replied, "Well, I guess it is all right", no written permission or approval was ever obtained (R. 281-2). Finally, the parties stipulated that:

> "... it is uncontroverted that defendant, General Motors Company, never gave written permission to the plaintiff to move its dealership location from Lee Street to the Stonewall Street location." (R. 148)

Although an assistant to the Buick zone manager had orally indicated approval of the son's proposal to move the Buick dealership to a quonset-type building then being used as a skating rink and less than one-half the size of the Stonewall Street premises, when Kemp, the Buick zone manager, himself heard of the propsal, he "turned it down" (R. 282-4; 289; 166; 175; 206). No written approval of the proposed move of the Buick dealership from Stonewall Street

was ever obtained (R. 282)."

The Lee Street premises were substantially larger than Stonewall Street, had more service stalls, and had commanded a rent of $600 a month as compared with the $250 a month rent of the smaller Stonewall Street building, located in the outlying section of Greenville (R. 157; 175-6; D. Ex. 9, R. 390; D. Ex. 11, R. 391).

As a result of the unauthorized move of Chevrolet from Lee Street to Stonewall Street, the combined floor space under roof was reduced from 25,000 square feet to only 10,000 square feet; the total show room space was reduced from that sufficient to accommodate six to eight cars to a space sufficient to accommodate three or four cars; the number of service stalls was reduced from eleven to five and the total monthly rental for both dealerships was reduced from $850 to $250 (R. 157; 175-6; 390-1). Both the Chevrolet and Buick dealerships were thus crowded into this reduced space, which theretofore had housed only the Buick dealership. The financial statement of Woodard Motor Company for the period January 1, 1955, through October 31, 1955, shows that Chevrolet new car sales totaled 435 units, while the Buick sales were only 90 new units—a ratio of 5 to 1.[7]

[6] Buick's surprise at the move of Chevrolet in with Buick at the Stonewall location is shown by the following testimony of the son: "Mr. Rogers came in and looked around, wanted to know what was going on, and I said 'I am moving Chevrolet into this building.' He looked kind of funny, he said, 'Are you re-dealing?' I said, 'No, I am not re-dealing.'" (R. 285)

[7] D. Ex. 37-B to the deposition of B. T. Woodard. Financial Statement p. 4. (not included in the printed record before this Court but before the Court of Appeals as an original exhibit).

After the Chevrolet dealership was moved in with Buick at the end of March 1956, the Chevrolet business declined (R. 258-9).

The pre-trial stipulation leaves no issue of fact as to respondent's dissatisfaction with the Stonewall Street location:

> "It is stipulated that the defendant, General Motors, was itself never satisfied with the location of the dealership in the Stonewall Street location." (R. 148)[*]

Chevrolet's Protests

Immediately upon learning of the move from the Lee Street to the Stonewall Street location, Chevrolet protested. The father testified that zone manager Alley "came over immediately" and protested and that the move was "disputed at the time it was done, yes, sir; it sure was" (R. 200-1). The son testified that Alley's "feelings were very plain; that we had redualed and moved without prior written approval" and that the set-up "was not agreeable to Chevrolet" (R. 310). The father also testified there was no doubt in his mind that Chevrolet regarded the Stonewall Street premises as "not adequate" and was "very unhappy" (R. 194-5). The father then assured Alley that the Stonewall Street location was "purely temporary" (R. 255-6) and that they planned to move

[*]Characteristic of petitioners' treatment of the record is their statement (Pet. 11) that: "Petitioners stipulated that the respondent was dissatisfied with the premises at 1403 Stonewall Street, but that such dissatisfaction was not in good faith." Petitioners seek to leave the impression that the statement of their contention that respondent's dissatisfaction was not in good faith was a part of the factual stipulation of the parties.

"just as quick as we could get available a new building or a different building" (R. 259). The son also testified that he told Alley that they couldn't rent the Lee Street building "for less than $1,000.00 per month; also that we planned to do something as soon as possible" (R. 309).[2]

The following month the Chevrolet dealers in the area attended a meeting for the purpose of signing new contracts. Alley refused to deliver a renewal contract to petitioners at that time but requested the father to call at the zone office for a conference (R. 161-2). At the conference in Alley's office on May 28, 1956, after the father again assured Alley that the location of Chevrolet at Stonewall Street was a "purely temporary location" and that other facilities would soon be furnished (R. 165-6; 188), as petitioners had repeatedly done ever since the unauthorized move (R. 255-6; 259; 308-9; 312-4), respondent delivered the contract which is involved in this suit, recited to be effective as of March 1, 1956 (R. 188, 46).

The recognition of both parties at the time of the signing and delivery of the contract that the Stonewall Street facilities were not satisfactory for the Chevrolet operation is evidenced by the pre-trial stipulation that:

> "At the time of the signing and delivery of the Franchise Agreement . . . Executed and delivered May 28, 1956, it was understood between plaintiff and the defendant that the Stonewall Street premises were not to be the permanent dealership location." (R. 149)

[2] Petitioners thereafter rejected repeated offers of the former Lee Street landlord to enter into another five-year lease at a reduced rental of $500 a month (R. 290-1).

Contemporaneously with the execution and delivery of the contract, petitioners executed a "Dealer Statement" which was also dated March 1, 1956, and shows the dealership address to be "3207 Lee Street, Greenville, Hunt County, Texas." (R. 148, 398). Other than the address shown on the Dealer Statement, no other address is shown on any of the writings constituting the contract.

Chevrolet's Urgings of Performance

During the ensuing fourteen months, respondent, through personal contact and correspondence, made repeated and unsuccessful efforts to persuade petitioners to provide satisfactory facilities for the Chevrolet dealership in accordance with the contract.

Thus, on August 22, 1956, zone manager Alley wrote the father, reiterating that the facilities at Stonewall Street were not adequate and requesting specific information concerning petitioners' announced intentions to "improve those facilities—either by a location on the highway, as quickly as the right of way is determined, or by obtaining other facilities that would be satisfactory" (R. 399). This letter went unanswered (R. 187).

On October 9, 1956, Alley's successor, Rice, wrote the father, reviewing the entire situation, reiterating Chevrolet's protest against the continuing failure to provide adequate facilities and concluding (R. 400-402):

> "We, therefore, take this means to be on record with you that within a reasonable time you will

provide separate, exclusive facilities which are both adequate and satisfactory to house the Chevrolet dealership operation. Our records indicate your understanding and agreement to provide facilities on that basis. Since it has been over six months since you consolidated the Chevrolet operation in the Buick facilities, it is felt that an agreement should be reached with you concerning a date by which you are to have satisfactory facilities available to house the Chevrolet dealership operation on an exclusive basis.

"An early reply to Mr. Alley's letter of August 22 in this connection will be appreciated."

On October 22, 1956, the son delivered to Rice the father's brief responding letter which referred only to "future plans . . . for the erection of a new building," and to one building which might be "suitable" and added that "we feel that there will be some good locations on the new super highway when completed" (R. 403).[6] At this meeting in the zone office, the son was again told that Chevrolet was dissatisfied with the move and petitioners' failure to provide Chevrolet with separate, satisfactory facilities (R. 191-2; 319).

On October 23, 1956, Rice wrote to the father, confirming his advice to the son on the previous day that he or the assistant zone manager Pryor would go to Greenville as soon as possible to inspect various proposed buildings and locations and stating (R. 404-5):

"Since your letter of October 22, does not specify any date by which you would have suitable

[6] The completion of the highway was not even in sight when the son's deposition was taken in July, 1958. As to when it might be completed, he testified that "only the Good Lord would know. I guess." (R. 301)

facilities available, your son was advised that a mutual agreement with you in this regard must be secured prior to January 1, 1957."

On October 31, 1956, Pryor inspected various properties in Greenville and informed petitioners "that probably any new location would be suitable to Mr. Rice" (R. 324). After this visit Pryor advised petitioners that the Stonewall premises were "not adequate even for an exclusive Chevrolet dealership" (D. Ex. 25, R. 406-7).

The son testified that during the first week in January 1957, Rice sent his representative Steele to see petitioners in order to help them secure a location and to find out, "if and when were you going to secure plans for a location" (R. 324). Upon being told nothing definite by petitioners,

> "Mr. Steele said 'That is well and fine but Mr. Rice told me to stay over here until you did something.' I told him that was fine, to make himself at home." (R. 324)

Steele remained four days before giving up and returning to Dallas (R. 324-5).

On January 18, 1957, Rice sent a registered letter to petitioners and stated (R. 406-7):

> "As of this date, your dealership does not appear to have taken any concrete steps to provide adequate facilities. Therefore, your attention is directed to the provisions of Section 11 of your current Chevrolet Dealer Selling Agreement. We advised you on the occasions noted above and several other occasions that the place of business

in which you are now operating as a Chevrolet dealer is not satisfactory either as to appearance and location nor is it adequate in size and layout for a new car sales operation.

"Chevrolet Motor Division expects that you will occupy adequate facilities in compliance with the aforesaid Section 11 on or before April 30, 1957, or that you will present concrete evidence to Chevrolet that dealership building construction is under way within that time in the event you propose to carry out your 'future plans' to erect a new building. We consider this time limit to be a very reasonable period."

After Rice's letter of January 18, 1957, Pryor and Steele each came back to Greenville on various occasions and told petitioners that "they were there for the purpose of lending any assistance they could" in helping to obtain adequate facilities and "to solve the facility problem" (R. 343-4).

In early April 1957, when the father advised Rice of several possible buildings, including the Chrysler-Plymouth building, Rice told him "to draw some plans or something on paper and present them" and he would then advise whether they were "suitable or not" and whether they "met the requirements of the selling agreement" (R. 198; 231-2; 209-10). This was Woodard's last conversation with Rice, and no plans were ever submitted (R. 257). The testimony on the point is explicit and unqualified (R. 257):

"Q. I will ask you, did you come in with specific plans for his consideration in an effort to meet the mutually satisfactory requirement for

selling? . . . Answer the question. Did you or did you not?

"A. No, sir."

On April 20, 1957, the son asked Pryor to lunch and, referring to Rice's letter of January 18, 1957, asked Pryor "what can be done about our situation, as Mr. Rice's dead-line is running out" (R. 337).[11] Pryor replied "That is not for me to decide; that is for you to decide what you can do or can't do" and that "the decision with respect to the facility or situation in Greenville was one that was going to have to be decided by Mr. Rice" (R. 337). Pryor also stated that "Rice was going to require you to conform to the program that had been laid out in the letter" (R. 338).

Throughout the entire period subsequent to March 1956 petitioners continued to represent and to give assurances to respondent that the move and redualing at Stonewall Street was "only a temporary thing" and was for "a short period of time" and that it would be remedied "as soon as possible" (R. 165-6; 194-5; 255-6; 259; 296; 308-9; 312-14). Finally, on July 23, 1957, nearly 90 days after the second deadline and some sixteen months after petitioners' unauthorized move, Chevrolet sent to petitioners a notice of termination of their contract, effective October 24, 1957, as authorized by Section 23B(2) of the contract, *supra*, pp. 9-10 (R. 414).

Following the termination of the contract, respondent repurchased from petitioners all of the cars, parts, accessories, signs and service tools, as requested by

[11] It should be noted that this is actually the second "deadline," since Rice's letter of October 23, 1958, *supra* pp. 15-16, had set January 1, 1957 as the date; this was extended to April 30, 1957 by Rice's letter of January 18, 1957, *supra* pp. 16-17.

petitioners, and discharged each and every obligation owing to petitioners under the terms of the contract, with respect to such repurchases, and also paid to petitioners all new car bonuses (R. 236-7).

The "Efforts" of Petitioners

Petitioners admitted that they had never decided upon nor secured any locations because they could not make up their minds where they wanted to locate and were still undecided after talking to the Highway Department representatives in March or April 1957 (R. 213-14; 366); that they had never made any offer, definite or contingent, on any property, or taken any options or spent any money to buy anything, anywhere, at any time (R. 308; 334-5); that no building plans were ever sought or secured from respondent or elsewhere, even though petitioners were aware that respondent had such plans available (R. 165, 257, 303); that no architect or contractor was ever consulted, nor were any plans or any cost estimates ever secured for either a new building or the remodeling or repairing of any old building (R. 257, 303); and that when the contract was terminated, as far as anything definite or concrete was concerned, no progress had been made, and the matter was no further along than it was when the renewal contract was entered into (R. 255-7); and Chevrolet remained at Stonewall Street with Buick[12] until the very end.

[12] The Court of Appeals in its opinion (Pet. 6a) says that the Buick dealership was sold in June. The father in a letter to Chevrolet on June 17, 1957, did say that the Buick dealership had been sold (R. 409), however, this statement was corrected by the son's testimony, and Buick remained in Stonewall with Chevrolet until the latter's termination in October, 1957 (R. 353; D. Ex. 4, R. 262-3).

Petitioners, in an apparent attempt to demonstrate that they sought to provide adequate facilities, enumerate the various "efforts" they made to obtain a satisfactory location (Pet. 9-10). The cursory nature of petitioners' inquiry in respect of each piece of property is revealed by the record, which shows that, far from entering into "negotiations" or exerting "efforts" to obtain a satisfactory facility, petitioners did nothing more than make casual inquiries regarding the availability of properties, but never at any time made a firm offer on anything nor did they represent to respondent that any such offer had been made.

Concerning the various properties mentioned in the petition, the record shows: as to the property on the new highway, petitioners testified that they "didn't make an offer on it" but "had the real estate agent to see what the least money was that would buy it" (R. 193-4); as to the International Harvester building, petitioners testified that all they remembered about it was that no firm offer had ever been made and they didn't think negotiations ever came "to a head" (R. 197); as regards the Chrysler-Plymouth building, petitioners testified they never had any agreement with Faulkner, the tenant of the building, with respect to his lease and never followed up any negotiations with Dr. Young who owned the building (R. 342); as to the "two lots in town," petitioners testified they "tried to buy a couple of lots down in town and could not buy them" and that, although there was some property available, it was not what they wanted (R. 214); as to the lot on North Stonewall Street, petitioners testified that they had "a man contact a fellow two or

three times and he never could buy it" (R. 214); as to the property on Highway 67-T, petitioners testified that when they learned of the price they advised the real estate agent that "there was no further need to look at this property" (R. 302); as to the Lee Street property, which the petitioners had abandoned, they testified that they had some discussion as to leasing the property at $500 a month rental with an option to buy but that they "never did negotiate terms" (R. 290-92); as to the property owned by the Kimbell Milling Company, petitioners testified that they could not remember the outcome of the negotiation but were of the belief that the property was not available (R. 339); as to the property characterized in the petition as "one block east of the Courthouse," petitioners testified they could not remember the details of the negotiations (R. 340); as to possible conversations with real estate agent Roger Wise one to three times a week, petitioners testified that all this amounted to was that Wise submitted any new properties he came across and that petitioners could not remember the details "because most of them I could reject immediately" (R. 339-40).

Apparently the only property that the petitioners ever claim to have given even more than passing consideration was that on the new highway. As to this property, petitioners testified that as far as they ever got, after a price of $50,000 was put on the property by real estate agent Wise, was to ask him if he thought it could be bought for $40,000 (R. 328). Petitioners admitted that they made no counter-offer and no firm offer (R. 193; 328); could not even re-

member who owned the property (R. 327); never communicated to Chevrolet that such property could be bought at a satisfactory price (R. 328); and that Chevrolet "didn't reject it" (R. 212).

By stipulation noted by the trial court,

> ". . . the last efforts by plaintiffs to ascertain the available access to the new superhighway was in March or April, 1957." (R. 150)

No other visit to the Highway Department was made after this date and, after the visit in March or April 1957, both petitioners lost interest in the property and dropped it from consideration (R. 329).

All of the petitioners' "efforts" to acquire adequate facilities are summed up in the following testimony (R. 235):

> "Q. Then I will restrict it to yourself. At no time had you made a firm offer to any of the owners of the various properties and buildings to purchase properties and buildings in connection with the location of the Chevrolet franchise, is that correct?
>
> "A. Yes, sir, I did not.
>
> "Q. Make any firm offer?
>
> "A. That is correct."

Petitioners assert (Pet. 20-1) that respondent's letter of August 22, 1956, to petitioners (R. 399) "recorded its understanding of the oral representations made to it at the time of its execution and delivery" of the contract on May 28, 1956, that petitioners had the "option" to "begin construction of a new build-

ing as soon as the right of way was determined or meanwhile provide other suitable facilities", and that the time within which to begin construction had not expired at the time of respondent's termination of the contract. All three assertions are contrary to the record. The letter was written three months after the execution of the contract and contains no reference either to the contract or to the meeting at which it was delivered. Petitioners' own testimony with respect to the meeting contains no reference to any such option (R. 187-8). The location and right-of-way of the new highway had, in fact, been determined prior to petitioners' only visit to the Highway Department in March or April, 1957, and only the fences along and access to the highway remained subject to possible change (R. 326-7).

Petitioners state that "on April 25, 1957, five days before the expiration of the dead-line set by respondent," petitioners "offered to acquire the Chrysler-Plymouth Building which respondent had indicated would be acceptable if repaired and remodeled" and imply that respondent acted unfairly in not granting a further extension of time for this purpose (Pet. 21). Actually, petitioners' letter of April 25 did not contain any such offer but merely stated: "It is possible, at this time, to purchase the Chrysler-Plymouth dealership building and lots on the South adjoining provided it would meet with your approval" (R. 408). However, as early as March 1956, respondent had told petitioners that the Chrysler-Plymouth building would be "satisfactory" (R. 178). Furthermore, in April 1957 Rice, in his last conversation with petitioners,

again told them that the Chrysler-Plymouth building would be satisfactory if repaired and remodeled and requested them to prepare and submit plans for consideration (R. 209-10; 231-2). But petitioners never did submit any plans for this or any other building, either before, with or subsequent to their letter of April 25, 1957 (R. 257). Neither did they ever make any offer to buy the building at any price (R. 307), nor make any arrangement with the tenant Faulkner who, as it turned out, abandoned his plans to move (R. 341-2).

* * * *

ARGUMENT

Petitioners, in a token effort to meet the basic requirements of Rule 19-1(b) of this Court, urge that a writ of certiorari should issue to review further the judgments below because (1) the District Court and the Court of Appeals have erroneously decided an important question of federal law; (2) the holdings below are in conflict with the law of Michigan, which was incorporated by reference into the contract between the parties; and (3) the District Court erroneously entered summary judgment pursuant to Rule 56, F.R.C.P., "in conflict with applicable decision of this Court."

When fairly considered, the record below shows that none of these reasons exist and that the case presents no questions calling for the exercise of this Court's discretionary certiorari power. For convenience, the contentions stated in the petition as the reasons for granting the writ will be discussed in the order presented in the petition.

I.

The Petition Presents No Important Question of Federal Law

It is only by misinterpreting the opinion below that petitioners are able to lay a foundation for their claim that there has been an erroneous interpretation of a federal statute. Petitioners' contention that the Court of Appeals has nullified the Act is based upon

petitioners' complete misinterpretation of that court's opinion.

The opinion of the Court of Appeals directly contradicts petitioners' argument that the lower courts ignored the concept of good faith imposed on the manufacturer by the Act. Even a casual reading of that opinion shows that petitioners' assertions of error are specious. They seek only "another hearing" on claims already rejected by two courts, a procedure disapproved by this Court in *Magnum Import Co. v. Coty*, 262 U.S. 159, 163.

Petitioners assert that the Court of Appeals "erroneously decided an important question of Federal Law" by holding, "in nullification" of the Act, "that the satisfaction and adequacy of the place of business prescribed by the franchise agreement was satisfaction and adequacy in the sole judgment of respondent, unquestionable by party or court except for fraud" (Pet. 3; 16). This is an unwarranted misinterpretation of the opinion of the Court of Appeals.

Respondent denies that the decision below has in any way nullified any provision of the Act. The Court of Appeals did not hold that the manufacturer's right to terminate for dissatisfaction under the contract here in suit was not affected by the Act. Neither did the court hold that all of petitioners' claims should be rejected on the ground that respondent's right to terminate for dissatisfaction, unquestionable under the common law save for fraud, could still be so exercised in spite of the Act.

The Court of Appeals decided two questions: whether the respondent was liable (1) "for breach of contract under the common law"; or (2) "for breach of contract or statutory duty" under the Act (Pet. 10a).

In respect of the claim for common law breach of contract, the court did hold that the reasonableness of the respondent's dissatisfaction was, as a matter of contract law, "not to be questioned by the other contracting party or by any tribunal," save for fraud (Pet. 11a). Such reasoning was in no manner employed to determine whether respondent had violated the Act. In deciding whether respondent violated the Act, the court independently held that "the good faith requirement, whether viewed in or outside of the context of coercion," did not prevent respondent from terminating the contract "where the dealer has, over a long period of time, violated a valid and material clause of the contract and has failed to comply with the continuing insistence of the manufacturer upon performance." The Court, after making a detailed analysis of the undisputed facts, concluded (Pet. 17a):

> "The duty of good faith, however measured, did not require the appellee to continue the contract arrangement for a longer period."

Petitioners would now urge that the court below failed to charge the respondent with any obligations, over and above those imposed by the contract, to act in good faith as required by the Act. Petitioners would further have this Court believe that the courts below disposed of the petitioners' claim that respondent violated the Act by holding that, since the contract vested

respondent with a right to terminate if dissatisfied, unquestionable except for fraud, the Act did not, and could not, impose any further duty of good faith upon respondent. Neither assertion is true.

The Court of Appeals recognized that the Act created a new cause of action and imposed duties of good faith upon respondent, irrespective of any lesser duty or contrary provision that might be contained in the contract. The opinion summarized the undisputed evidence which constituted the factual predicate for the court's holding that under any standard—either that of the common law or of the Act—respondent's patience and forbearance in giving petitioners sixteen months to acquire adequate facilities for the Chevrolet dealership established respondent's good faith as a matter of law (Pet. 14a-16a; 16a-17a).[13]

Petitioners ignore that portion of the opinion which interprets the Act in the light of its legislative history (Pet. 14a-17a). Such legislative history makes clear the intent of Congress and it cannot be questioned that it was considered by the Court of Appeals (pp. 14a-15a). The opinion makes express references to Senate Report No. 2073, 84th Cong., 2d Sess. (1956), and quotes from House Report No. 2850, 84th Cong., 2d

[13]Petitioners have challenged the statement of the court below that the Stonewall Street location "was in fact inadequate for the Chevrolet dealership." Actually, the adequacy or inadequacy of the Stonewall Street premises has been rendered academic. Prior to the execution of the contract in suit, respondent notified petitioners that the premises would be unacceptable and it has been stipulated that the contract was entered into with the express understanding "that the Stonewall Street premises were not to be the permanent dealership location." The record does, however, contain detailed evidence of the reasons for their inadequacy and is devoid of any evidence that they were adequate (supra, pp. 11-12).

Sess., (1956) (inadvertently referred to as No. 2580 in the opinion below, at Pet. 15a).

Only selected portions of this House Report are set forth in the appendix to the petition. The very heart of the majority report entitled "Explanation" is omitted. It was from this omitted section that the court below quoted the express limitation that the Act:

> ". . . does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the bill curtail the manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise." (House Report, p. 9; Pet. 16a.)

The legislative history of the Act, the precise terms of the Act itself, and the decided cases show plainly that an automobile manufacturer is not proscribed from inserting in its dealer contracts requirements for "product representation commensurate with the good will attached to its trade name" and requirements for the maintenance of proper facilities for the sale and servicing of its motor vehicles. Nor has it ever been suggested that the Act forbids a manufacturer to terminate the contract of a dealer who has, over a long period of time, deliberately violated such requirements.

The courts below, far from nullifying any part of the Act as contended by petitioners, have carefully and correctly applied the Act to the particular undisputed facts before them and have correctly concluded that the respondent has not, as a matter of law, vio-

lated the Act.[14]

II.

The Holding of the Court of Appeals on the Common Law Count Is Not in Conflict With Michigan Law

Petitioners assert that the holding below on the common law breach of contract claim is contrary to the applicable law of Michigan (Pet. 3; 18-19; 22). This assertion is completely without foundation. Again, petitioners seek to create a basis for certiorari by an erroneous interpretation of law, here of Michigan law. Petitioners' argument ignores the record, assumes the conclusion and distorts the law of Michigan.

In urging that the Court of Appeals erred in relying on the "early decision of an intermediate Texas appellate court," *Sanger v. Slayden*,[15] rather than applying the law of Michigan, petitioners ignore a vital point (Pet. 18-19). The *Sanger* case quoted extensively from and relied upon the *Wood Machine* case which the petitioners cite as declarative of the law of Michigan.

[14] Petitioners' "Statement of the Case" argumentatively infers that the opinion below was at least in part based on that Court's "entertaining some doubt" as to constitutionality of the Federal Act (Pet. 14). This inference is inapportable because the Court of Appeals found it unnecessary to make "a decision with respect to the constitutionality of the Act" (Pet. 11a). Since the Court held respondent did not violate the Act, it followed the rule of this Court that the issue of constitutionality would not be resolved because unnecessary to full disposition of the appeal. Only if respondent is held to have violated the Act would respondent then be entitled to have its defense of unconstitutionality judicially determined. The provisions of Sec. 2403, 28 U.S.C., in respect to certification to the Attorney General, were complied with. (R. 146).

[15] 26 S.W. 847, 849 (Tex. Civ. App.).

The law of Michigan recognizes two distinct types of satisfaction contracts: those involving matters of "individual judgment," and those "involving mere operative or mechanical fitness." As to the first type, the expressed dissatisfaction of the promisee is not open to question except for fraud. As to the second, where objective standards are available, the reasonableness of the party's dissatisfaction may be questioned. *Wood Machine Co. v. Smith*, 50 Mich. 565, 15 N.W. 906; *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N.W. 457.

The case of *Ward v. Flex-O-Tube Co.*, 194 F. 2d 500 (6th Cir.), from the Eastern District of Michigan, is directly in point and dispositive of the issue which petitioners have attempted to raise. Petitioners also cite this case as declarative of the allegedly different Michigan law. In the *Ward* case, the contract provided that the "net worth" of a business was guaranteed to be a stated amount. In a suit involving this guaranty contract, one determinative issue was whether the "net worth" was to be satisfactory in the judgment of the promisee or could, and should be judged by standards of operative fitness. The Court held that "this was a case involving *business judgment*, including the evaluation of potential or uncertain liabilities, rather than one involving mere operative or mechanical fitness or established commercial values. . . ." (emphasis supplied.)

In *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N.W. 457, petitioners' principal authority, the Court reviewed Michigan law, reiterated the rule of

Wood Machine Co., and held that an automobile dealership contract involved *business judgment* and that such a contract involved "something more than operative fitness or mechanical utility of a tangible thing."

Petitioners' entire argument is based solely upon the assertion, oft repeated but never explained or supported by record reference, that the provision in a contract between an automobile manufacturer and a dealer, requiring the dealer to "maintain a place of business satisfactory as to appearance and location, and adequate in size and layout for new car sales operations, service operations, parts and accessories sales, and new and used car sales," in order to "provide product representation commensurate with the good will attached to the name 'Chevrolet,'" prescribes conditions of mechanical utility, rather than matters of business judgment. From this *ipse dixit* assertion, petitioners conclude that the contract here in suit is the second type mentioned above and that under common law rules it is not the manufacturer who is to determine whether the appearance, location, size and layout of the dealer's facility are satisfactory and adequate and provide product representation commensurate with the good will attached to the name of its product, but a hypothetical reasonable man or a jury applying hypothetical standards of "mere operative or mechanical fitness."

The contract between the parties recognized that the manufacturer has a legitimate interest and obligation to see that the facilities offered to the public by its dealers are satisfactory in appearance and location and adequate in size and layout for the sale and

servicing of the manufacturer's products. The very purpose of Section 11, as it states, is to insure that the dealer will maintain facilities commensurate with the good will attached to the manufacturer's trade name and to facilitate the proper sale and servicing of the manufacturer's products.

The issue which petitioners seek to raise is totally devoid of merit, since, tested either by the law of Texas or the law of Michigan, the termination gave rise to no common law cause of action in contract and presents no question of incorrect interpretation or application of state law, calling for the exercise of this Court's discretionary certiorari jurisdiction.

III.

Summary Judgment Was Properly Entered on Behalf of Respondent

The only other ground urged by petitioners in support of the petition is that the Court of Appeals, in affirming the summary judgment granted by the District Court, so far departed from generally accepted standards of federal procedure as to "require" this Court to grant further review. The only authority cited in support of this baseless assertion is *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620.

Respondent's answer to this alleged ground is: (1) the record presents no question which merits review by this Court, and (2) the summary judgment was fully warranted by Rule 56, F.R.C.P., since there was no genuine issue as to any material fact and respondent was entitled to judgment as a matter of law.

The rulings of both the District Court and the Court of Appeals were based on a routine application of the Rule to questions involving the construction of unquestioned written documents, the legal consequences to be drawn from undisputed facts, and the effect of petitioners' judicial admissions and stipulations, when applied to the allegations in the complaint. As Justice Brennan said (In Chambers) in *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 4 L.Ed. 2d 30, 32, 80 S.Ct. 16:

> "But ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts."

In asserting that summary judgment was improperly entered because "disputed issues of material fact" remained in the case, petitioners completely ignore their own dispositive admissions and stipulations of fact and seek to create "phantom issues" solely upon the basis of assertions in their pleadings or in their briefs or upon mere contentions made at pre-trial.[6] This is not enough. The very purpose of the summary judgment procedure is to pierce the allegations of the complaint in order to determine whether there is in truth any genuine issue of material fact. As said by the Fifth Circuit in *Surkin v. Chartenis*, 197 F. 2d 77, 79, the purpose of summary judgment is to

> ". . . separate the mere formal from the circum-

[6] 6 Moore, Federal Practice, ¶ 56.15 [2], p. 2123.

stantial, to determine what if any issues of fact are present for a jury to try, and to enable the court to expeditiously dispose of cases by giving judgment on the law where the material facts are not in dispute. (Citing *Sartor* and several other Fifth Circuit opinions.) The sufficiency of the complaint does not control and, although the burden is on the moving party to demonstrate clearly that there is no genuine issue of fact, the opposing party must sufficiently disclose what the evidence will be to show that there is a genuine issue of fact to be tried."

To the same effect is *Zoby v. American Fidelity Co.*, 242 F. 2d 76, 80, where the court said that a "bare contention that the issue is disputable will not suffice."

The *Sartor* case, which is the sole authority cited by petitioners in support of their claim for still another review of their contentions, is inapposite for three reasons. In that case, (1) the very existence of the cause of action depended upon "questions of damage," which Rule 56 has specifically reserved from the summary judgment process; (2) the defendant sought to sustain its motion for summary judgment on the basis of affidavits containing opinion evidence; and (3) the supporting affidavits were given by interested witnesses.[17]

None of these aspects of *Sartor* is present here. The evidence which enabled the District Court in the case at bar to pierce the allegations of the complaint and contentions advanced consisted of petitioners' depositional

[17] This Court has even more recently condemned "trial by affidavit" of interested witnesses in *Poller v. Columbia Broadcasting System*, 368 U. S. 464, 473.

admissions and the pretrial stipulations. Further, the evidence consisted, not of expert opinion, but of factual statements and direct admissions of fact by petitioners themselves, which a jury would not be at liberty to disbelieve. Directly applicable is the statement of the Court in *Bennett v. Flanigon*, 220 F. 2d 799, 803 (7th Cir.), that:

> Thus it appears affirmatively that his claim stated on paper became completely disintegrated when exposed to the light of his own deposition."

If the testimony of petitioners were untrue, inaccurate or incomplete, they had ample opportunity to explain, correct or supplement it. They did nothing. Instead, petitioners moved for summary judgment on their own pleadings and depositions. Petitioners make no claim that any part of their testimony was inaccurate or inadvertent or that their testimony at trial would be any different or that other evidence might be forthcoming.

A similar situation was presented in *Chambers & Co. v. Equitable Life Assurance Society*, 224 F. 2d 338, 346, which led the Fifth Circuit, in affirming summary judgment, to say:

> "Appellant does not point out any additional proof which may be available and this record reflects what may be deemed as a typical case for summary judgment."

and:

> ". . . it is apparent that all of the facts are before

> the court as fully as if they had been developed at an extensive hearing."

The same conclusion was reached by the Sixth Circuit in *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.*, 137 F. 2d 871, *cert. den.* 320 U.S. 800.

As expressed by Judge Learned Hand in *Dyer v. MacDougall*, 201 F.2d 265, 268:

> ". . . we must assume that what they . . . said in their depositions, they would say at a trial."

In the instant case the matters in issue were not matters of fact peculiarly within the knowledge of respondent, but instead were equally within the knowledge of petitioners. Petitioners have sworn fully, positively and with no retraction. The situation here is closely analogous to that in *Baumler v. Ford Motor Co.*, 89 F. Supp. 218, 221 (D. Minn.), where the Court said:

> "Plaintiff urges that he should have his day in court and that his claim should not be disposed of by summary judgment. Plaintiff has had his day in court. His testimony as incorporated in the deposition is before the Court in the same manner as if the evidence had been taken at the trial."

Similarly, in *Atwood v. Kerlin*, 264 F. 2d 4, 6 (2nd Cir.), *cert. denied*, 361 U.S. 817, the appellants urged that the entry of a summary judgment deprived them "of their right to their 'day in court' by a trial upon the merits. . . ." They asserted that where a question of a party's "good faith is involved a summary judgment in his favor without trial is improper." The

Court of Appeals, in affirming summary judgment in favor of the defendant, rejected this contention and said:

> "So far as we can ascertain from a study of the record there are no 'controverted facts,' merely disagreements as to the legal consequences of admitted facts, or disputes as to the legally correct interpretation of documents and exhibits. Nor do we find any evidence whatever of bad faith on the part of defendant, despite plaintiffs' vociferous charges of breaches of trust, malicious prosecution, conspiracy, and slander of title. Indeed, if either party's good faith is to be doubted, there seems more reason to doubt the plaintiffs'." (264 F. 2d at 7)

Petitioners have had their day in court. The record made reveals: the abandonment by petitioners, in direct breach of contract, of their long-approved dealership facilities; their redualing of the Chevrolet and Buick dealerships less than six months after respondent had given the new Buick dealership to the son in reliance upon petitioners' agreement that separate dealership facilities would be established and maintained; immediate and continuing protest by respondent; immediate and repeated assurances and representations by petitioners that the Stonewall Street location was "purely temporary" and that adequate facilities for the Chevrolet dealership, would be established within "a short period of time"; the renewal by respondent of the Chevrolet contract in reliance upon these assurances and representations of petitioners; the patient efforts by respondent for more than a year to induce and persuade petitioners to occupy adequate facilities

as they had promised; the complete failure of petitioners to take any concrete steps whatever to fulfill their continuing contractual obligations; and finally, after some sixteen months had elapsed, petitioners "were no nearer to the providing of an adequate facility for the operation of the Chevrolet dealership than when the prohibited move was made to the Stonewall Street location" (Pet. 17a).

It was petitioners' own conduct, as shown by their depositions and stipulations, which demonstrated the complete absence of any genuine issue of any material fact and compelled the granting of the summary judgment which they now seek to have this Court review.

CONCLUSION

The court below, in affirming summary judgment in favor of respondent, carefully considered the record, the specific provisions of the Act, its legislative history, and the uniform judicial construction that has been placed on the Act since its enactment in August, 1956. To accept petitioners' argument would raise serious constitutional questions, would subvert the specific provisions of the statute and the stated legislative policy and would produce a result which the Congress specifically stated it did not intend. The Act was never intended as a refuge for automobile dealers who are unwilling to accept the fundamental responsibilities placed upon them by the nature of the industry and their contract undertakings.

As we have already seen, the Act does not, and was not intended to, prohibit the manufacturer from ter-

minating the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the Act curtail the manufacturer's right to cancel an inefficient or undesirable dealer's franchise or, as petitioners would have this Court believe, freeze present channels of distribution.[18]

Petitioners have failed to demonstrate that there are any grounds for the exercise of this Court's discretionary certiorari jurisdiction. The District Court and the Court of Appeals have not erroneously decided an important question of federal law. The holdings below are not in conflict with the law of Michigan. The District Court has not erroneously granted summary judgment under Rule 56.

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel

May 3, 1962

[18] H. R. Rep. No. 2850, 84th Cong., 2d Sess. 9 (1956), 3 U.S. Code Cong. & Admin. News 4596, 4603 (1956).

CERTIFICATE OF SERVICE

I, Ira Butler, attorney for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2d day of May, 1962, I served the foregoing RESPONDENT'S BRIEF IN OPPOSITION to the PETITION FOR WRIT OF CERTIORARI by depositing two envelopes containing three copies each in a United States mail box, with first-class postage prepaid, addressed respectively to Irving L. Goldberg, Esq. and to William P. Fonville, Esq., both at 2232 Republic National Bank Building, Dallas 1, Texas, attorneys for petitioners.

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